No. 87-1178

In the Supreme Court of the United States

OCTOBER TERM, 1987

TRIPLE-A BASEBALL CLUB ASSOCIATES, TRIPLE-A BASEBALL CLUB OF MAINE, INC., AND JORDAN I. KOBRITZ,

PETITIONERS,

v.

NORTHEASTERN BASEBALL, INC., and MULTI-PURPOSE STADIUM AUTHORITY OF LACKAWANNA COUNTY,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

THOMAS B. WHEATLEY*
JOHN A. HOBSON
PERKINS, THOMPSON, HINCKLEY & KEDDY
One Canal Plaza
P.O. Box 426
Portland, ME 04112
(207) 774-2635

* Counsel of Record

Blanchard Press, Inc., Boston, Mass. — Law Printers [617] 426-6690

I

QUESTIONS PRESENTED

The petition seeks to raise an issue which respondents believe may more properly be stated as follows:

Whether, in determining that under Maine Law specific performance was the appropriate remedy for breach of a contract for sale of a Triple-A baseball franchise without remanding to the District Court for a decision on that issue, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

RULE 28.1 LISTING

Respondent Northeastern Baseball, Inc. is a non-profit, non-stock Pennsylvania corporation, which has a self-perpetuating board made up of community volunteers who reside in Lackawanna County or Luzerne County, Pennsylvania.

Respondent Multi-Purpose Stadium Authority of Lackawanna County is a public authority of the Commonwealth of Pennsylvania. Its members are appointed by the Board of County Commissioners of the County of Lackawanna, Pennsylvania. The Multi-Purpose Stadium Authority of Lackawanna County is under common control with the Northeastern Pennsylvania Sports Development Corporation, a non-profit stock corporation with 2 shares of stock, in that one share is owned by the County of Lackawanna, Pennsylvania. The other share is owned by the County of Luzerne, Pennsylvania.

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Statement of the Case

There are no constitutional provisions, treaties, statutes, ordinances or regulations involved in this case. See Petition ("Pet.") at 3. This case arises from the refusal of Petitioners (Triple-A Baseball Club Associates, and its general partners

Jordan I. Kobritz and Triple-A Baseball Club of Maine, Inc.) to convey a Triple-A baseball franchise to Respondent Northeastern Baseball, Inc. ("NBI") in accordance with an Agreement dated September 3, 1986.[1]

The September 3 Agreement was the culmination of an 8-year search by John McGee, President of NBI, to acquire a Triple-A baseball franchise for the Scranton, Pennsylvania area. The acquisition of Petitioners' Triple-A franchise was particularly important to NBI because of the rarity with which such Triple-A franchises are available for sale. Indeed the uncontradicted testimony of the President of the International League of Professional Baseball Clubs (the league to which Petitioners' Triple-A franchise belonged) was that there had been only one transfer of an International League franchise in the last ten years and that involved the transfer to Petitioners of the franchise at issue in this case.

Under the September 3 Agreement (Pet. App. 35-39), Petitioner Triple-A Baseball Club Associates (the "Limited Partnership") contracted to convey its Triple-A franchise to NBI for $2.4 million (¶¶ 1 & 2), and NBI contracted to convey its Double-A franchise to the Limited Partnership for $400,000 (¶¶ 3 & 4), but the transfer of the Double-A franchise was subject to the approval of the Eastern League (¶ 9). If the Eastern League refused to approve the transfer, the agreement for the sale of the Triple-A franchise was to remain in full force and effect at a reduced price of $2 million (¶ 5). A separate side agreement was entered into between NBI and Petitioner Kobritz (Pet. App. 40-42), which provided that in the event the Eastern League failed to approve the transfer of NBI's Double-A team to the Limited Partnership, it would be transferred to Kobritz individually for $500,000 (¶ 1), and NBI

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[1] NBI assigned its rights under the September 3 Agreement to Respondent Multi-Purpose Stadium Authority of Lackawanna County, but reserved the right to enforce the Agreement.

and Kobritz would enter into a consulting agreement which would pay Kobritz the same amount ($500,000). The side agreement further provided that in the event the Eastern League denied approval of the transfer of the Double-A franchise to Kobritz, Kobritz would still be paid the consulting fees reduced (but not below $400,000) by the amount of any indemnification damages NBI is required to pay the Eastern League for acquiring the Triple-A International League franchise (¶ 3) (as a result of the Eastern League's claim to Scranton as Eastern League territory).

The Eastern League refused to approve the transfer of NBI's Double-A franchise, and instead made a non-negotiable demand that NBI relinquish its Double-A franchise to the Eastern League in satisfaction of its claim that Scranton was Eastern League territory.[2] NBI appeared at the scheduled closing under the September 3 Agreement, and was ready, willing and able to pay the $2 million for the Triple-A franchise. Petitioners, however, refused to convey the Triple-A franchise on the pretext that NBI had breached the September 3 Agreement by being unable to transfer its Double-A franchise.

On the same day as the closing, Petitioners filed their original Complaint for declaratory judgment against NBI. NBI counterclaimed for a declaratory judgment and for breach of contract, and sought, *inter alia*, an order that Petitioners specifically perform their obligations in accordance with the September 3 Agreement and transfer the Triple-A franchise to NBI.

The case was tried to the District Court jury waived. The findings of fact in the District Court's Opinion (Pet. App. 58-94) detailed the reasons for its conclusion that NBI "acted in good faith throughout the transaction" (Pet. App. 102) and

[2] Petitioners' brief contains several inaccuracies about the events surrounding the Eastern League's refusal to approve the transfer and the communications between NBI and Kobritz about the Eastern League's refusal. Since these inaccuracies do not directly bear on the appropriateness of this Court granting a writ of certiorari, Respondents will not address them in this brief.

"attempted in good faith and without pretense to obtain Eastern League approval of the transfer" (*Id.*). However, the District Court concluded that the "refuse to approve" language in paragraph 5 of the Agreement was ambiguous (Pet. App. 103), and then read into the agreement an implied condition precedent that the refusal to approve be "on the merits" (Pet. App. 105-06), apparently in the form of "a formal vote by the league directors disapproving the sale on the merits" (Pet. App. 103). The District Court declared that the September 3 Agreement (Pet. App. 35-39) terminated by its own terms in accordance with paragraph 14 of the agreement on the failure of an implied condition precedent (Pet. App. 47 and 106). In doing so, the District Court simply misread the September 3 Agreement and reversed the effect of its language in favor of the drafters (the Petitioners), which would entitle them to keep the Triple-A franchise in Maine and avoid their obligations to convey it to NBI.[3]

In a detailed decision, the U.S. Court of Appeals for the First Circuit reversed the District Court's decision and held that "by rewriting the contract between the parties," the District Court "violated the basic principles of contract law."

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[3] The district Court failed to recognize that the only conditions precedent were those specified in paragraph 10. Paragraph 10 (Pet. App. 38) specified three conditions precedent: (A) approval by NBI's Board of Directors by September 11, 1986, (B) approval of the transfer of the Triple-A franchise to NBI by the International League by September 11, 1986, and (C) approval by the Limited Partners of Triple-A Baseball Club Associates by September 11, 1986. Paragraph 14 (Pet. App. 39), upon which the District Court erroneously relied in declaring that the agreement terminated by its own terms, provided that in the event two out of three of those "foregoing conditions" shall not have occurred (the exception being approval by NBI's Board), then the deposit with accrued interest shall be refunded to NBI, and thereafter the Agreement shall terminate. Paragraph 14 also provided that in the event those two conditions specified in Paragraph 10, other than approval by NBI's Board, were met, the deposit would be retained as liquidated damages. All three of the conditions precedent of Paragraph 10 were met, and consequently the agreement could not have terminated by its own terms under Paragraph 14.

Triple-A Baseball Club Associates v. *Northeastern Baseball, Inc.*, 832 F.2d 214, 220 (1st Cir. 1987); Pet. App. 13-14. Specifically, the Court of Appeals held that the District Court erred in finding the September 3 Agreement to be ambiguous and in reading into that agreement an implied condition precedent:

> We do not find the phrase "refuse to approve the sale" ambiguous. Unlike the District Court, we think the term is clear and does not need to be defined. The words "refuse to approve" are only susceptible of one meaning; they mean what they say. . . .
>
> [The District Court] found, based on extrinsic evidence that the term [refuse to approve] had to be interpreted to mean there was an implied-in-fact condition precedent that the refusal had to be "on the merits." With due respect, we think the phrase, "on the merits" not only changes the sparse plain language of the contract but is itself ambiguous.

832 F.2d at 221; Pet. App. 17.

The Court of Appeals consequently concluded that the Agreement should be enforced as it was actually written, which would result in the transfer of the Triple-A franchise to NBI. After noting that it was unable to find any Maine case deciding the precise question of whether specific performance is appropriate with respect to the sale of a franchise (832 F.2d at 223; Pet. App. 21), the Court of Appeals carefully examined Maine law on specific performance (832 F.2d at 222-23; Pet. App. 20-21) as well as the unanimity of the relevant law in other jurisdictions (832 F.2d at 223-24; Pet. App. 21-24), and determined that specific performance was the appropriate remedy for breach of a contract for sale of a baseball franchise (832 F.2d at 224-25; Pet. App. 24-26). Accordingly, the Court of Appeals remanded the case to the District Court with directions to issue a decree of specific performance ordering that

"upon payment of two million dollars, Triple-A Baseball Club Associates shall forthwith convey all of its right, title and ownership in its baseball franchise in the International League to Northeastern Baseball, Inc." 832 F.2d at 228; Pet. App. 34-35. On November 3, 1987, Petitioners moved for a stay of the Court of Appeals' mandate pending petition for writ of certiorari, which the Court of Appeals denied.

The District Court by Order Entering Judgment on Remand dated November 24, 1987, entered judgment on NBI's counterclaim and ordered that the Petitioners perform the September 3 Agreement. Pet. App. 132-34. By Supplemental Order dated January 4, 1988, the District Court ordered the closing to take place at 9:00 a.m. on January 19, 1988. Pet. App. 137-38. At the closing on January 19, 1988, Petitioners refused to convey the team as required by the District Court's Order. Therefore, by Order Vesting Title dated January 20, 1988, the District Court, pursuant to its power under Fed.R.Civ.P. 70, transferred the title to the Triple-A franchise to NBI. The Order Vesting Title, which was issued after Petitioners' petition was filed in this Court, is reproduced as an appendix to this brief, *infra* at 11.

Summary of Argument

Petitioners seek to invoke this Court's certiorari jurisdiction because they disagree with the Court of Appeals' decision on Maine Law on the issue of the appropriateness of specific performance for the breach of a contract for sale of a Triple-A baseball franchise. Although Petitioners' real complaint is with the Court of Appeals' determination of the substantive State law on this issue, in order to bring their appeal within the requirements for a writ of certiorari, Petitioners' recharacterize the issue as the Court of Appeals' failure to remand this case to the District Court for determination of the appropriateness of specific performance as a remedy. However, in light of the Court of Appeals' careful analysis of Maine

Law as well as the unanimity of the relevant case law of other jurisdictions, and in light of the record and findings of fact which were before the Court of Appeals, it is patently clear that the Court of Appeals did not depart from the accepted and usual course of judicial proceedings so as to require intervention by this Court through the use of its certiorari jurisdiction. Indeed, rather than departing from judicial precedent, the Court of Appeals' decision comports with the case law in this area as well as with principles of judicial economy.

Argument

The decision by the Court of Appeals is not in conflict with any decision of another court of appeals on the same matter; no federal question was involved in this case; and the Court of Appeals did not depart from the accepted and usual course of judicial proceedings nor did it sanction such departure by the District Court. Respondents, therefore, respectfully submit that this case does not warrant exercise of this Court's certiorari jurisdiction. See Rule 17.1(a) of the Rules of this Court.

Petitioners' sole stated basis for their Petition for a Writ of Certiorari is their contention that the Court of Appeals' direction to the District Court for an entry of specific performance in this case was so far outside the bounds of accepted judicial proceedings as to call for an exercise of this Court's power of supervision. Pet. at 3. There are several fatal flaws to that argument.

1. The Court of Appeals followed the only other federal court decision directly on point in this area. In directing the District Court to enter a decree of specific performance without first remanding that issue to the District Court for a determination, the Court of Appeals followed the decision of the Court of Appeals for the Eighth Circuit in *Laclede Gas Co.* v. *Amoco Oil Co.*, 522 F.2d 33, 38-40 (8th Cir. 1975). *Triple-A Baseball Club Associates*, 832 F.2d at 222; Pet. App. 20. A similar result was reached in *United States* v. *Harrison*

County, Mississippi, 399 F.2d 485 (5th Cir. 1968), *cert. denied*, 397 U.S. 918 (1970) (Circuit Court reversed trial court's interpretation of contract and remanded with directions to enforce contract terms by injunction). *See also Wray* v. *Harris*, 350 So.2d 409 (Ala. 1977).

Petitioners cite no authority contrary to *Laclede*; there is no split of authority in the circuits. Instead Petitioners seek to discredit the Court of Appeals' reliance on *Laclede* by stating that "*Laclede*, which hinged on a peculiarity of Missouri law, is simply inapplicable to this case . . . ." Pet. at 15. However, an examination of Missouri law reveals that the principles governing specific performance under Missouri law are very similar to the principles which govern under Maine law. Both Missouri and Maine recognize that specific performance is within the discretion of the Court, but this discretion is not unbounded since it must be exercised within the constraints of the doctrines and principles of equity. *Compare Eisenbeis* v. *Shillington*, 349 Mo. 108, 159 So.2d 641 (1941), and *Rockhill Tennis Club* v. *Volker*, 331 Mo. 947, 56 S.W.2d 9 (1932), *with Telegraphone Corp.* v. *Canadian Telegraphone Co.*, 103 Me. 444, 69 A. 767 (1908), and *Hull* v. *Sturdivant*, 46 Me. 34, 41 (1858).

Moreover, like Missouri, Maine recognizes there are certain types of contracts for the breach of which specific performance will routinely be decreed. *Hull* v. *Sturdivant*, 46 Me. 34, 41 (1858) ("Where a contract, respecting real property, is in its nature and circumstances unobjectionable, it is as much a matter of course for a Court of Equity to decree a specific performance, as it is for a Court of Law to give damages . . . .")

2. Significantly, Petitioners cite no authority for the proposition that specific performance is not the appropriate remedy for breach of a contract to sell such a franchise, as all authority is to the contrary. The Court of Appeals simply determined that contracts for sale of a baseball franchise

(much like contracts for sale of real property) come within the category of cases in which specific performance is routinely decreed. In coming to this determination, the Court of Appeals followed unanimous case law precedent.

As the Court of Appeals correctly noted, every court which has addressed the issue of the appropriateness of specific performance of a contract for sale of a franchise has concluded that specific performance is the appropriate remedy. *Triple-A Baseball Club Associates*, 832 F.2d at 223; Pet. App. 21-22, *citing Specific Performance of Agreement for Sale of Private Franchise*, 82 A.L.R.3d 1102 (1978). Thus, in predicting that Maine law would follow the other jurisdictions which had addressed the issue, the Court of Appeals was certainly not departing from the usual course of judicial conduct. Rather its decision on this issue placed it squarely in line with the universal case law precedent in this area. *See, e.g., Leasco Corp.* v. *Taussig*, 473 F.2d 777, 785-786 (2d Cir. 1972); *DeBauge Brothers, Inc.* v. *Whitsitt*, 212 Kans. 758, 512 P.2d 487, 489-490 (1973); *Bidwell* v. *Long*, 14 App. Div.2d 168, 218 N.Y.S.2d 108, 110 (1961); *Hogan* v. *Norfleet*, 113 So.2d 437, 439 (Fla. Dist. Ct. App. 1959); *Cochrane* v. *Szpakowski*, 355 Pa. 357, 49 A.2d 692, 694 (1946).

3. Furthermore, from the standpoint of judicial economy, Petitioners' argument makes no sense. The issue of the proper remedy for a breach of the September 3 Agreement had been tried in the District Court and briefed at both the trial and appellate levels. Given the clearly unique nature of a Triple-A franchise and the unanimous case law in this area, it would have been an unnecessary use of scarce judicial resources for the Court of Appeals to remand this issue to the District Court and then wait for an appeal by the disappointed party in order to render the eventual decision that specific performance was the appropriate remedy.[4]

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[4] Petitioners' primary argument against a decree of specific performance, both at the trial and appellate level, was that NBI already owned a Double-A franchise and thus should be precluded from obtaining the Triple-A fran-

4. In the final analysis, Petitioners simply disagree with the Court of Appeals' assessment of what the Maine Supreme Judicial Court would have decided if faced with the issue of the appropriateness of specific performance when a contract for the sale of a Triple-A baseball franchise has been breached. The Petitioners' disagreement with the First Circuit's interpretation of state law is not only unfounded, but even if correct would not be a proper basis on which to base a petition for writ of certiorari.[5]

Conclusion

For the foregoing reasons, Respondents submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS B. WHEATLEY*
JOHN A. HOBSON
PERKINS, THOMPSON, HINCKLEY & KEDDY
One Canal Plaza
P.O. Box 426
Portland, ME 04112
(207) 774-2635
Attorneys for Respondents

* Counsel of Record

chise. Pet. at 16 n.7. However, as the Court of Appeals noted, this argument is way off base given the vast differences between a Double-A and a Triple-A baseball franchise. *Triple-A Baseball Club Associates*, 832 F.2d at 224-225; Pet. App. 25-26. Indeed, under Petitioners' argument an art collector could not obtain specific performance of a contract to purchase a painting by Van Gogh if he already owned a Norman Rockwell painting.

[5] One basis for certiorari under the 1970 Rules was "Where a court of appeals... has decided an important state or territorial question in a way in conflict with applicable state or territorial law" (1970 Rule 19(1)(b)), but that basis for certiorari was eliminated by the 1980 Revision. 13 J. MOORE, H. BENDIX AND B. RINGLE, *Moore's Federal Practice* ¶ 817.01[3] at SC 17-8 (2d ed. 1985).

Appendix

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

TRIPLE-A BASEBALL CLUB ASSOCIATES, JORDAN KOBRITZ, and TRIPLE-A BASEBALL CLUB OF MAINE, INC., PLAINTIFFS, v. NORTHEASTERN BASEBALL, INC., DEFENDANT.	CIVIL NO. 86-0331-P
TRIPLE-A BASEBALL CLUB ASSOCIATES, JORDAN KOBRITZ, and TRIPLE-A BASEBALL CLUB OF MAINE, INC., PLAINTIFFS, v. INTERNATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS, DEFENDANT.	(CASES CONSOLIDATED BY AGREEMENT) CIVIL NO. 86-0360-P

ORDER VESTING TITLE

By judgment entered on November 24, 1987, this Court ordered the specific performance of the September 3 and September 4, 1986 contracts between the parties in these cases for conveyance of all plaintiffs' right, title and ownership in

their franchise in the International League to Northeastern Baseball, Inc. upon payment of the sum of two million dollars ($2,000,000.00). This transfer was to be in accordance with the terms and provisions of the contract and of the opinion of the Court of Appeals for the First Circuit in this matter, filed on October 13, 1987. No conveyance took place and on January 5, 1988 a hearing was held on Defendant Northeastern Baseball, Inc.'s Motion to Compel Compliance with Court Order. That hearing resulted in an Order Supplementing Order Entering Judgment on Remand, filed January 4, 1988, which ordered the parties to the contracts to hold a closing at 9:00 a.m. on January 19, 1988 to accomplish the conveyance of title previously ordered by the Court.

At a hearing held this morning, January 20, 1988, the Court learned through the representations of counsel for all parties, that the closing and conveyance ordered by the court for January 19, 1988, did not go forward because Plaintiffs reserved from the bill of sale all rights, including territorial rights, which Triple-A Baseball Club Associates may possess under the National Association Agreement and the various league constitutions. Although the status of territorial rights was not resolved at the time of the Court's hearing on January 4, the Court's file in this matter now contains a letter dated January 12, 1988, from counsel for Defendant International League of Professional Baseball Clubs, and a letter dated January 11, 1988, by Harold M. Cooper, President of the International League of Baseball Clubs, stating the League's position on territorial rights as an incident of ownership of a franchise, which is based in part upon the undisputed provisions of section 10.06(c) of the National Association Agreement.[1] The letter of counsel states that

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[1] The letter from Frank A. Ray, counsel for the International League, represents that section 10.06(c) of the National Association Agreement provides:

> Upon a League granting any person, firm or corporation membership in its League for the purpose of operating a Baseball franchise in a

> any transfer of membership or sale of a franchise in the League which is approved by the League is subject to maintenance of territorial rights associated with the franchise. In other words, until such time as the subject franchise leaves Old Orchard Beach, Maine, the ten mile radius of territorial rights is retained by the owner of the franchise and by the League.

The letter from Mr. Cooper to John McGee, dated January 11, 1988, confirms that

> the International League has approved the sale of the franchise to Northeastern Baseball, Inc., and its assignee Multi-Purpose Stadium Authority. Our constitution permits a member to operate within a city or area within the circuit of this league which is known as the "franchise territory." In this case, Maine (Old Orchard Beach).

The court relies on these documents provided by the International League because, as Charles Eshbach, President of the National Association of Professional Baseball Leagues, Inc., has stated in a letter to Plaintiff Kobritz of January 19, 1988, the issue of territorial rights has been determined by the Executive Committee of the Association to be a matter not within its jurisdiction "but rather . . . a matter to be handled at the league level as a league matter."

The Court hereby finds that the disputed territorial rights are a legal incident of ownership of the subject franchise and that they must be conveyed with the subject franchise under the agreements of September 3 and 4.

Rule 70 of the Federal Rules of Civil Procedure provides the Court with a procedure for enforcing an order for a specific act which has not been completed within the time specified:

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city, such a membership shall carry with it protected territorial rights for the area within said city limits and within the ten (10) mile area above referred to. Such rights shall continue during the life of said membership.

"If the real or personal property is within the district, the court . . . may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law."

The Court finds that the franchise in question is within this district and that its orders for conveyance of that transfer on January 19, 1988 have not been complied with.

Accordingly, is is hereby ORDERED that upon payment of two million dollars ($2,000,000.00) by Defendant Northeastern Baseball, Inc., by Noon tomorrow, January 21, 1988, Plaintiff Triple-A Baseball Club Associates will be divested of its unencumbered title, by force of this Order, in its franchise in the International League of Professional Baseball Clubs, and all right, title and ownership in the franchise, specifically including territorial and all other rights which Triple-A Baseball Club Associates may possess under the National Association agreement and the various league constitutions and by-laws, will be hereby vested in Northeastern Baseball, Inc.

This Order shall be effective to transfer title as aforesaid upon filing with the Clerk of this Court by Owen W. Wells, Esq., counsel for Northeastern Baseball, Inc., of an affidavit reciting under oath that he has delivered to Plaintiffs' counsel, Keith A. Powers, Esq. a bank check in the amount of two million dollars ($2,000,000.00) payable to Triple-A Baseball Club Associates.

s/ GENE CARTER
GENE CARTER
United States District Judge

Dated at Portland, Maine this 20th day of January, 1988.